Federal Communications Commission

FCC 98-184

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Examination of Current Policy	)	
Concerning the Treatment of	)	GC Docket No. 96-55
Confidential Information	)	
Submitted to the Commission	)	

REPORT AND ORDER

Adopted: July 29, 1998 Released: August 4, 1998

By the Commission:

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I. INTRODUCTION

1. We began this proceeding to evaluate our rules and policies concerning the treatment of competitively sensitive information that has been provided to the Commission.[1] In this Report and Order, we address our general policies governing the handling of confidential information as well as specific issues of confidentiality involving various types of FCC proceedings. In addition, we amend our rules to (i) set out more clearly what should be contained in a request that information not be routinely available for public disclosure; (ii) provide that audit information and programming contracts will be presumed to be exempt from routine public disclosure; and (iii) codify our practice of sometimes deferring action on a request for confidentiality until a request for inspection is made. Finally, we adopt a revised version of the Model Protective Order proposed in the *Notice*.

[1] *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406, 12408 (1996) (*Notice*).

II. BACKGROUND

A. Authority to Disclose and Withhold Competitively Sensitive Information

1. Freedom of Information Act

2. As we discussed in more detail in the *Notice*, the Freedom of Information Act (FOIA),[2] requires the Commission to disclose reasonably described agency records requested by any person, unless the records contain information that fits within one or more of the nine exemptions from disclosure in the Act.[3] Even when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds.[4]

3. For the purposes of this proceeding, the most important of the FOIA exemptions is Exemption 4, which states that the government need not disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[5] In the context of the FOIA, a trade secret is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[6] The terms "commercial or financial information" are given their ordinary meaning for purposes of the FOIA.[7]

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[2] 5 U.S.C. § 552.

[3] 5 U.S.C. § 552(b); *see also* 47 C.F.R. § 0.457 (types of records not routinely available for public inspection under the FOIA regulations of the Commission).

[4] *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-94 (1979) (*Chrysler Corp*).

[5] 5 U.S.C. § 552(b)(4).

[6] *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also AT&T Information Systems, Inc. v. GSA*, 627 F. Supp. 1396, 1401 n.9 (D.D.C. 1986).

[7] *See Public Citizen Health Research Group*, 704 F.2d at 1290; *see also Landfair v. U.S. Dep't of Army*, 645 F. Supp. 325, 327 (D.D.C. 1986) (commercial and financial information can include business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition); *International Satellite, Inc.*, 57 RR 2d 460, 462 (1984) (information is commercial "if it relates to commerce" whether or not submitter is a for-profit entity).

4. For many years the applicable standard for whether commercial or financial information was "confidential" under Exemption 4 of FOIA was set forth in *National Parks and Conservation Ass'n v. Morton*:[8] a "[c]ommercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[9] The *National Parks* decision left open the possibility of a third confidentiality category that would protect other governmental interests such as compliance and program effectiveness.[10] Subsequently, in *Critical Mass*,[11] the court held that the *National Parks* two-pronged test for "confidential" information applied only to situations where a party *must* submit information to a federal agency.[12] Under *Critical Mass*, submissions that are required to "realize the benefits of a voluntary program" generally are considered mandatory.[13] *Critical Mass* sets a different standard for assessing the confidentiality of information that is submitted voluntarily: "financial or commercial information provided to the Government on a voluntary basis is 'confidential' under Exemption 4 if it is of a kind that would customarily not be released to

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[8] 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*).

[9] 498 F.2d at 770; *see also, e.g., Arvig Telephone Co.*, 3 FCC Rcd 3723, 3723-24 (Com. Car. Bur. 1988) (applying *National Parks*).

[10] 498 F.2d at 770 n.17; *see, e.g., Allnet Communication Services v. FCC*, 800 F. Supp. 984, 990 (D.D.C. 1992) (Exemption 4 protects government interest in effectiveness of programs), *aff'd per curiam*, No. 92-5351 (D.C. Cir. May 27, 1994); *see also 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1, 10 (1st Cir. 1983) (test is whether disclosure of Exemption 4 material will harm an "identifiable private or governmental interest which the Congress sought to protect").

[11] *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*).

[12] 975 F.2d at 879.

[13] *See Lykes Bros. S.S. Co. v. Peña*, No. 92-2780, slip op. at 9 (D.D.C. Sept. 2, 1993); *accord*, Department of Justice FOIA Update, Spring 1993, at 5.

the public by the person from whom it was obtained."[14] Information may also be withheld under Exemption 4 if it is "privileged" as well as if it is confidential.[15]

2. The Trade Secrets Act and Commission Authority to Disclose Exemption 4 Records

5. While FOIA Exemption 4 allows an agency to withhold business competitive information from public disclosure, the Trade Secrets Act[16] acts as an affirmative restraint on an agency's ability to release such information. The Trade Secrets Act provides criminal and employment penalties for federal officers or employees who disclose trade secrets, except as "authorized by law."[17] As we discussed at greater length in the *Notice*,[18] Sections 0.457(d)(1) and 0.457(d)(2)(i) of the Commission's rules constitute the requisite legal authorization for disclosure of competitively sensitive information under the Trade Secrets Act.[19] These rules permit disclosure of trade secrets and commercial or financial information upon a "persuasive showing" of the reasons in favor of releasing the information.[20] Other provisions of the Communications Act may also authorize the release of materials governed by the Trade Secrets Act in particular circumstances. For example, Section 220(f) of the Communications Act[21] authorizes FCC employees, upon direction of the Commission or a

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[14] *Id.*

[15] *E.g., Washington Post Co. v. HHS*, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982); *see also Anderson v. HHS*, 907 F.2d 936, 945 (10th Cir. 1990) (recognizing that certain discovery privileges may constitute additional ground for non-disclosure under Exemption 4); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 400 (5th Cir.) (recognizing that Exemption 4 extends to privileges created by Constitution, statute or common law, but declining to hold that Exemption 4 incorporates a lender-borrower privilege), *cert. denied*, 471 U.S. 1137 (1985).

[16] 18 U.S.C. § 1905.

[17] *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987) (*CNA Fin.*), *cert. denied*, 485 U.S. 977 (1988).

[18] 11 FCC Rcd at 12414-15.

[19] *Northern Television v. FCC*, 1 Gov't Disclosure Serv (P-H) ¶80,124 (No. 79-3468) (D.D.C. Apr. 18, 1980); *see also Chrysler Corp.*, 441 U.S. at 301-03.

[20] 47 C.F.R. §§ 0.457(d)(1), 0.457(d)(2)(i).

[21] 47 U.S.C. § 220(f).

court, to disclose information gathered by the Commission while examining a carrier's books or accounts.[22]

B. Review of Commission's Rules and Policies Governing Disclosure

6. The Commission's rules governing disclosure of information distinguish between records that are "routinely available" for public inspection and those that are not.[23] Section 0.457(d) of the Commission's rules, which implements FOIA Exemption 4, provides that certain categories of materials listed therein are "not routinely available for public inspection" because they generally fall within the scope of Exemption 4.[24] These materials may not be disclosed by Commission employees unless an appropriate request for inspection is made, and after weighing the considerations favoring disclosure and non-disclosure, the Commission determines that a "persuasive showing" has been made to warrant disclosure.[25]

7. If information or materials submitted to the Commission do not fall within one of the categories of materials not routinely available for public inspection, the person submitting them may request on an *ad hoc* basis that such information not be routinely available for public inspection.[26] Such a request will be granted if it presents by a

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[22] *Amendment of Parts 0, 1, and 64 of the Commission's Rules*, 5 FCC Rcd 4601, 4603 n.5 (1990); *see also Amendment of Part 0 of the Commission's Rules*, 57 RR 2d 1648, 1650 (1985).

[23] *See* 47 C.F.R. § 0.451.

[24] Our rules currently provide that the following materials related to trade secrets and commercial or financial information are presumed not routinely available for public inspection: (i) financial reports submitted by licensees of broadcast stations pursuant to 47 C.F.R § 1.611; (ii) applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications; (iii) Schedules 2, 3, and 4 of financial reports submitted for cable television systems pursuant to 47 C.F.R. § 76.403; (iv) annual fee computation forms submitted for cable television systems pursuant to 47 C.F.R. § 76.406; and (v) certain materials submitted to the Commission prior to July 4, 1967, or with respect to equipment authorizations between July 4, 1967 and March 25, 1974. *See* 47 C.F.R. § 0.457(d). *See* ¶¶ 73-74, *infra*, where we amend this rule to delete obsolete references.

[25] 47 C.F.R. §§ 0.451(b)(5); 0.457(d); and 0.461(f)(4).

[26] 47 C.F.R. § 0.459(a). In the absence of a request that materials not be routinely available for public inspection, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection. 47 C.F.R. §§ 0.457(d)(2)(i) and 0.459(f). Ordinarily, however, in the absence of such a request, materials which are submitted to the Commission will be made available for inspection upon request pursuant to Section 0.461, even though some question may be present as to whether they contain trade secrets or like matter. 47 C.F.R. § 0.457(d)(2)(i).

preponderance of the evidence a case for non-disclosure consistent with the provisions of FOIA.[27] Information submitted under a request for confidentiality will be treated as confidential until the relevant Bureau rules on the request, and in the event the request is denied, until the Bureau gives the submitting party a period to seek review by the full Commission and the courts.[28] If the request for confidential treatment is granted, any person wishing to inspect the information or materials must submit a request for inspection (*i.e.*, a FOIA request) under Section 0.461,[29] and make a "persuasive showing" as to the reasons for inspection.[30] A request for confidentiality may be granted either conditionally or unconditionally.[31]

8. As discussed, the Commission's rules provide for the disclosure of Exemption 4 material if a "persuasive showing" is made. Consistent with the Supreme Court's decision in *FCC v. Schreiber*,[32] the rules also contemplate that the Commission will engage in a balancing of the interests favoring disclosure and non-disclosure.[33] In balancing these interests, the Commission has been sensitive to ensuring that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage. Accordingly, the Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding,[34] or where the Commission has identified a compelling public

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[27] 47 C.F.R. § 0.459(d); *see, e.g., GE American Communications, Inc.*, 11 FCC Rcd 11497, 11498 n.3 (Internat'l Bur. 1996); *Sandab Communications Ltd. Partnership II*, 11 FCC Rcd 11790, 11791 (1996) (*Sandab*), *citing TKR Cable of Ramapo*, 11 FCC Rcd 3538 (1996).

[28] *See* 47 C.F.R. §§ 0.459(g) and (h).

[29] 47 C.F.R. § 0.461(c).

[30] 47 C.F.R. § 0.461(c).

[31] 47 C.F.R. § 0.461(f)(4).

[32] 381 U.S. 279, 291-92 (1965).

[33] *See* 381 U.S. at 291-92.

[34] *See, e.g., The Western Union Telegraph Company*, 2 FCC Rcd 4485, 4487 (1987) (citing *Kannapolis Television Co.*, 80 F.C.C.2d 307 (1980) (*Kannapolis*)).

interest in disclosure.[35] Even in such circumstances, the Commission does not automatically authorize public release of such information.[36] Rather, the Commission has adhered to a policy of not authorizing the disclosure of confidential financial information "on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence" that will resolve an issue before the Commission.[37]

9. In recent years, the Commission also has increasingly relied on special remedies such as redaction,[38] aggregated data or summaries,[39] and protective orders[40] to

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[35] *See, e.g., MCI Telecommunications Corp.*, 58 RR 2d 187, 190 (1985).

[36] *See, e.g. Hubbard Broadcasting, Inc.*, 46 RR 2d 1261, 1265 (1979) (where released financial data already demonstrates losses, it is not necessary to disclose additional data to pinpoint causes of losses); *Newport TV Cable Co., Inc.*, 55 F.C.C.2d 805, 806-07 (1975) (where released balance sheets already demonstrate profits, it is not necessary to disclose additional data to prove profitability).

[37] *Classical Radio for Connecticut, Inc.*, 69 F.C.C.2d 1517, 1520 n.4 (1978) (*Classical Radio*) (citing *Sioux Empire Broadcasting Company*, 10 F.C.C.2d 132 (1967)); *accord, Letter from Kathleen M. H. Wallman to John L. McGrew*, 10 FCC Rcd 10574, 10575 (Com. Car. Bur. 1995) (*McGrew Letter*) (citing *Classical Radio*), *app. for rev. pending*; *see also Petition of Public Utility Commission, State of Hawaii*, 10 FCC Rcd 2881, 2888 (Wireless Bur. 1995) (*Hawaii II*) (information must be directly relevant to a required determination), *modified on other grounds* 10 FCC Rcd. 3984 (Wireless Bur. 1995) (*Hawaii III*); *Robert J. Butler*, 6 FCC Rcd 5414, 5418 (1991) (*Butler*); *American Telephone and Telegraph Co.*, 5 FCC Rcd 2464 (1990) (quoting *AT&T*, FOIA Control No. 88-190 (CCB Nov. 23, 1988) distinguishing between material of "critical significance" and data providing a "factual context" for the consideration of broad policy issues and concluding with respect to the latter the prospect of competitive harm likely to flow from release outweighs value of making information available).

[38] *See, e.g., Allnet Communications Services, Inc.*, 8 FCC Rcd 5629, 5630 (1993) (withholding from public release some redacted material provided to the parties under a protective order, but releasing other redacted material that did not contain confidential information).

[39] *See, e.g., id.* (finding certain averaged data not to be competitively sensitive); *Bellsouth Corp.*, 8 FCC Rcd 8129, 8130 (1993) (releasing summary of audit findings despite claim of confidentiality since summary nature of information significantly diminished the likelihood of competitive harm).

[40] *See, e.g., McGrew Letter*, 10 FCC Rcd at 10575; *Hawaii II*, 10 FCC Rcd at 2889; *Petition of the Public Utilities Commission, State of Hawaii*, 10 FCC Rcd 2359, 2371-79 (CCB 1995) (*Hawaii I*); *In re Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, 9 FCC Rcd 2613 (Com. Car. Bur. 1994) (*McCaw-AT&T*); *Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs* (*ONA Access Tariff*), 7 FCC Rcd 1526, 1538-41 (Com. Car. Bur. 1992), *aff'd*, 9 FCC Rcd 180 (1993); *Motorola Satellite Communications, Inc. Request for Pioneer's*

balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials. Consistent with its authority to grant requests for confidential treatment either conditionally or unconditionally,[41] the Commission, in particular, has relied on protective orders or agreements. Protective orders or agreements require parties to whom confidential information is made available to limit the persons who will have access to the information and the purposes for which the information will be used. As two recent Bureau orders have recently noted with respect to competitively sensitive information: "even when information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under the FOIA may outweigh the public benefit in disclosure."[42] In such instances, disclosure under a protective order or agreement may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose.[43]

III. DISCUSSION

A. General Issues

10. As we observed in the *Notice*,[44] the handling of confidential information requires the Commission to balance the concerns of the parties submitting information and the interest of the public in accessing that information. The manner in which the Commission performs this task affects both the competitive nature of the telecommunications industry and the performance of the Commission's public responsibilities. As the telecommunications industry becomes increasingly competitive, participants increasingly assert that the information they provide to the Commission is competitively sensitive. Likewise, there are an increasing number of disputes among competitors concerning requests for confidential treatment. Given these developments, we sought comments on whether the

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Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band, 7 FCC Rcd 5062, 5063 (1992) (*Motorola*).

[41] 47 C.F.R. § 0.461(f)(4).

[42] *McGrew Letter*, 10 FCC Rcd at 10575; *Hawaii I*, 10 FCC Rcd at 2366; *see also ONA Access Tariff*, 7 FCC Rcd at 1531 (citing *Pennzoil Co. v. FPC*, 534 F.2d 627, 631-32 (5th Cir. 1976), for the proposition that in considering discretionary disclosure of Exemption 4 material, agencies must consider whether less extensive disclosure may provide the public with adequate knowledge while protecting proprietary information).

[43] *See McGrew Letter*, 10 FCC Rcd at 10575; *Hawaii I*, 10 FCC Rcd at 2366.

[44] 11 FCC Rcd at 12422.

Commission should retain or modify the standard requiring parties seeking disclosure of trade secrets and confidential commercial or financial information to make a "persuasive showing" of the reasons in favor of the information's release.[45] We sought recommendations on whether the same standards should be applied in particular types of Commission proceedings, and encouraged commenters who favored different standards to propose them.[46] We also sought comment on the advisability of adopting a model protective order to more efficiently process confidentiality requests.[47] We inquired whether it is appropriate for the Commission to draft a decision that relies on confidential data (or data disclosed pursuant to protective order) without publicly revealing that data.[48] And, we invited commenters to address any other issues relating to the Commission's policies and rules on confidential information.[49]

11. Substantiating Confidentiality Claims. When a person submitting information to the Commission requests that it not be made available routinely to the public, Section 0.459(b) requires that each such request contain a statement of the reasons for withholding the materials from inspection and the factual basis for the request. Because the Commission sometimes receives insufficiently substantiated requests for confidentiality, we sought comment on whether the Commission should more precisely identify the information that is necessary to comply with Section 0.459(b). We suggested six categories of information the submitter could provide to substantiate requests for confidentiality.[50]

12. We believe, as do several of the parties,[51] that specifically identifying types of information we need to evaluate requests for confidentiality will reduce the number of unsubstantiated requests that we receive and conserve the resources of the submitters by

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[45] *Id.* at 12423.

[46] *Id.*

[47] *Id.* at 12424.

[48] *Id.* at 12423.

[49] *Id.* at 12424.

[50] *Id.* at 12434-35. The *Notice* erroneously referred to Section 0.461 instead of Section 0.459.

[51] *See, e.g.*, MCI Comments at 5; CBT Comments at 5-6; GTE Comments at 3-4; TH&F Comments at 3; *cf.* Kay Reply Comments at 4-5. *But see* AT&T Reply Comments at 9-10 (not necessary to specify information); Joint Parties Comments at 25-26 (substantiation requirements would be problematic).

providing them with guidance as to what kind of information we require to decide a confidentiality request. Therefore, we have decided to amend our rules accordingly. Several of the factors we adopt are relevant to a *National Parks* or *Critical Mass* analysis. We also agree with GTE that the submitting party ought to explain how disclosure of the information could result in significant competitive harm, since that may be a significant factor in weighing the interests for and against disclosure.[52] We also agree with TH&F that all requests for confidentiality should identify the Commission proceeding in which the information was submitted or describe the circumstances giving rise to the submission.[53] We do not think, however, that the submission of an affidavit concerning the confidentiality of the specified information should automatically result in designating the information as confidential.[54] We also decline to require the submitting party to identify categories of persons who should be denied access,[55] though we note that submitters may do so in the context of explaining why the submission should receive confidential treatment.

13. Accordingly, we will amend Section 0.459(b) to list the types of information that should be included in a request. Where relevant, the following should be submitted:

(1) identification of the specific information for which confidential treatment is sought;

(2) identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

(3) explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

(4) explanation of the degree to which the information concerns a service that is subject to competition;

(5) explanation of how disclosure of the information could result in substantial competitive harm;

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[52] *See* GTE Comments at 3-4.

[53] *See* TH&F Comments at 3.

[54] *Compare* CBT Comments at 7 (advocating presumption of confidentiality approach) *with* MCI Reply Comments at 6-7 (criticizing this approach).

[55] *See* TH&F Comments at 3.

(6) identification of any measures taken by the submitting party to prevent unauthorized disclosure;

(7) identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

(8) justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(9) any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

14. We do not agree with the Joint Parties that substantiation of a confidentiality request at the time the request is made is arbitrary and unduly burdensome.[56] To the contrary, this substantiation facilitates the *National Parks* and *Critical Mass* analysis and serves to facilitate public access to material not within FOIA Exemption 4. To the extent there are changes in, for example, the measures taken by the submitter to prevent disclosure, the extent to which the information has already been disclosed, and the degree of competition facing the service in question, between the time the request for confidential treatment is made and the time a request for disclosure is received,[57] we note that submitters are permitted to update their confidentiality request before any records are released.[58]

15. "Persuasive Showing" That Confidential Materials Should Be Released. To obtain access to records listed in Section 0.457(d) or records withheld from inspection under Section 0.459(a), our current rules provide that the requesting party must make "[a] persuasive showing as to the reasons for inspection" in a filing which must "contain a statement of the reasons for inspection and the facts in support thereof."[59] We sought comment on whether the persuasive showing standard continues to be appropriate.

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[56] *See* Joint Parties Comments at 25-26.

[57] *Cf. id.* at 26.

[58] *See, e.g., Southwestern Bell Telephone Company, Transmittal No. 2525*, 11 FCC Rcd 3175 (1996) (noting filing of a supplement to support further its claim of confidentiality).

[59] 47 C.F.R. §§ 0.457(d)(1) and (d)(2)(i). *See also* 47 C.F.R. § 0.461.

16. In response, several parties filing comments seek clarification of the "persuasive showing" standard.[60] Some commenters complain that the "persuasive showing" standard is too subjective and does not allow the submitter to know with certainty whether confidential treatment will be accorded until a request for inspection is made.[61] We believe, however, that the determinations of whether the showing standard has been met should continue to be made on a case-by-case basis.[62] A case-by-case determination is appropriate because it requires a balancing of, *inter alia*, the type of proceeding, the relevance of the information, and the nature of the information.[63] The Commission's current rules contemplate that the Commission will engage in a balancing of the public and private interests when determining whether the "persuasive showing" standard has been met.[64] That balancing may well take into account the type of proceeding involved, whether the requestor is a party to the proceeding, and may also be affected by other factors, such as whether it is feasible to use a protective order. Frequently, the basis for requiring submitters to disclose information is to ensure fairness to the other parties in the proceeding. We find that the approaches suggested by the parties would offer little improvement over the Commission's current practices and accordingly decline to replace the "persuasive showing" standard with different standards based on the type of proceeding. Our general policies concerning the submission of confidential information in specific types of proceedings are, however, discussed in more detail in Section III.C., *infra*.

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[60] *See, e.g.*, CBT Comments at 2; Joint Parties Comments at 5-6; MCI Comments at 14-15; AT&T Reply Comments at 6; GTE Reply Comments at 4; Joint Parties Reply Comments at 4; Time Warner Reply Comments at 4-5.

[61] *See, e.g.*, Aitken Comments at 2. *Compare* GTE Comments at 4-5 ("persuasive showing" standard offers a "sound basis for making . . . evaluation").

[62] *See, e.g., Butler*, 6 FCC Rcd at 5418, *citing Western Union Telegraph Co.* 2 FCC Rcd 4485, 4487 (1987); *Knoxville Broadcasting Corp.*, 87 F.C.C.2d 1099, 1105 (1981); and *Classical Radio*, 69 F.C.C.2d at 1520 n.4; *see also Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 737-38 & n.15 (D.C. Cir. 1976); *RCA Global Communications, Inc. v. FCC*, 524 F. Supp. 579, 584 & n.8 (D. Del. 1981); *NTV Enterprises, Inc.*., 62 F.C.C.2d 722, 723 (1976); and *Amaturo Group, Inc.*, 69 F.C.C.2d 1, 2 (1976).

[63] *See, e.g., Thomas N. Locke*, 8 FCC Rcd 8746 (1993); *Butler*, 6 FCC Rcd at 5418; and *Kannapolis*, 80 F.C.C.2d at 308, for examples of the application of the "persuasive showing" standard.

[64] *See* 47 C.F.R. § 0.457(d).

17. We thus agree with the majority of commenters that the Commission should retain the persuasive showing standard.[65] Because we believe that a case-by-case determination is most appropriate, we decline to adopt a blanket rule requiring the requester to demonstrate that access is "vital" to the conduct of a proceeding,[66] necessary to the "fundamental integrity" of the Commission process at issue,[67] or that the information have a direct impact on the requestor.[68] We also decline to impose a requirement that the requester prove that the information or a substitute cannot be obtained by other means.[69] We believe that to do so would impose an unreasonable burden on the requestor and might deny the Commission the benefit of comment from commenters with limited resources. Moreover, the fact that the information could be obtained by other means, albeit at greater difficulty, may in some cases suggest that the information is not really confidential for purposes of FOIA Exemption 4.

18. Commenters also point out that, where materials are voluntarily submitted, our rules allow a party to request that the information be returned if confidentiality is not granted.[70] These commenters express a concern that the distinction between voluntarily submitted and required information may put more heavily regulated entities at a competitive disadvantage vis-a-vis new entrants.[71] We recognize that a more heavily regulated entity may in some instances be subject to mandatory submissions that do not apply to a new entrant. As part of the biennial review process pursuant to section 11 of the Communications Act[72] and otherwise, the Commission is striving to minimize any such burdens. We also note that whether or not materials are submitted voluntarily, the Commission may not return them to

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[65] *See, e.g.*, TH&F Reply Comments at 4-5; Joint Parties Comments at 5; GTE Comments at 4.

[66] *Cf., e.g.*, Aitken Comments at 1-2; Lurya Comments at 1-2.

[67] *Cf.* CBT Comments at 8.

[68] *Cf.* TH&F Comments at 4.

[69] *Cf.* TH&F Comments at 4.

[70] *Cf., e.g.*, GTE Comments at 7-8, *citing*, 47 C.F.R. § 0.459(e). We note that our rule was adopted well before the court's decision in *Critical Mass*. Therefore, the legal standard for "voluntary submissions" articulated in *Critical Mass*, which is intended to determine the applicability of Exemption 4, is not necessarily coexistent with the scope of "voluntary submissions" that may be covered by our rule.

[71] *Cf., e.g.*, GTE Comments at 2-3.

[72] 47 C.F.R. § 161.

the submitter once it has received a FOIA request for the documents.[73] Therefore, as a practical matter, once a request for documents is received, no submitter, whether regulated or not, may have its documents returned.

19. Burden of Proof. Several parties commented on the burden of proof associated with confidentiality determinations.[74] Our rules provide that the party initially claiming confidentiality pursuant to Section 0.459(a) bears the burden of proving by a preponderance of the evidence that such treatment is appropriate.[75] If a party's request has been granted, it has, by definition, met that burden of proof, sufficient to demonstrate that the information falls within FOIA Exemption 4. The types of materials listed in Section 0.457(d) are accepted by the Commission as confidential because, on a generic basis, they have been found to contain confidential information and are exempt from disclosure under FOIA Exemption 4.[76] Similarly, the Commission may find, on its own motion, that specific materials should not be routinely made available because they contain trade secrets or confidential information.[77] Thereafter, when a request is made for disclosure of materials

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[73] *In the Matter of Southwestern Bell Telephone Co. on Requests for Inspection of Records*, 12 FCC Rcd 7770, 7774 (1997) (*Southwestern*).

[74] *See, e.g.*, Joint Parties Comments at 5-6; TH&F Reply Comments at 4-5; Aitken Reply Comments at 3-4; Kay Comments at 4; GTE Comments at 4; SBC Reply Comments at 6. *Cf.* NCTA Comments at 2; MCI Comments at 4-7; Time Warner Comments at 9-10.

[75] *See* 47 C.F.R. § 0.459(d); *see also Sandab*, 11 FCC Rcd at 11791; *Amendment Of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Rcd 2614, 2622 & n.47 (1993) (*CCB Complaint Rules*), *citing Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Amendment of Commission's Rules Regarding Confidential Treatment of Information Submitted to Commission*, 98 F.C.C.2d 1, 4 (1984).

We reject the suggestion that where a party initially claims confidentiality, the Commission staff should bear the burden of showing that the information should not be accorded confidential treatment. *See* Lurya Comments at 1. Consistent with FOIA's presumption in favor of disclosure, the Commission's rules appropriately place the burden of showing that a record should not be routinely available for public inspection on the proponent of that claim.

[76] *See* ¶¶ 73-75, *infra*, where we discuss amendments to Section 0.457(d)(1) to eliminate obsolete references.

[77] *See, e.g., Viking Dispatch Services, Inc.*, 11 FCC Rcd 6368 (Wireless Bur. 1996) (on our own motion granting confidentiality to more documents than were the subject of the confidentiality request).

deemed confidential under any of these circumstances, we agree with the parties commenting[78] that the requester of such information should continue to bear the burden of making a persuasive showing as to the reasons for inspection when access to confidential information is sought.[79]

20. This burden of making a persuasive showing as to the reasons for inspection is consistent with FOIA's presumption in favor of disclosure because the burden only applies to information already determined to fall within Exemption 4. As discussed in Section III.E., below, the Commission sometimes defers action on requests for confidentiality if a request for inspection has not been made. In those circumstances, if a request for inspection is made, we first consider whether the party submitting the information has met its burden of proving by a preponderance of the evidence that confidential treatment is appropriate, and then apply the persuasive showing test.

B. Model Protective Order

21. In recent years, the Commission has tried to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials by making more use of special remedies such as protective orders.[80] Protective orders can provide the benefit of protecting competitively valuable information while permitting limited disclosure for a specific public purpose.[81] Nonetheless, the Commission is mindful that extensive reliance on protective orders may also impose burdens on the public and the Commission.[82] Thus, we sought comment on whether it would be helpful for the Commission to develop a standard protective order that could be modified as appropriate to fit the circumstances of particular cases. We supplied a draft Model Protective Order (MPO), and encouraged commenters to identify any modifications that may be necessary to make it suitable for various types of Commission proceedings. We also sought

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[78] *See, e.g.*, Joint Parties Comments at 5-6; MCI Reply Comments at 2-3.

[79] 47 C.F.R. §§ 0.457(d)(2) and 0.457(d)(2)(i).

[80] *See, e.g., McGrew Letter*, 10 FCC Rcd at 10575; *Hawaii I and II, supra; McCaw-AT&T, supra; ONA Access Tariffs, supra; Motorola, supra.*

[81] *McGrew Letter*, 10 FCC Rcd at 10575; *Hawaii I*, 10 FCC Rcd at 2366.

[82] *See Motorola*, 7 FCC Rcd at 5064 n.7.

recommendations on the procedures the Commission should use to resolve disputes regarding the issuance and content of protective orders, and how to ensure compliance with them.[83]

22. Adoption of the MPO (Appendix C). The commenting parties were divided in opinion as to whether we should adopt the MPO, or some form thereof.[84] On the whole, however, we conclude that the benefits of adopting an MPO for general use in Commission proceedings will be substantial. It will reduce the need for lengthy negotiations or litigation over the terms of such orders and help prevent delays in proceedings. It is not our intention, however, to suggest that protective agreements can be used for information falling outside of the nine categories of material exempt from disclosure under the FOIA. Under the FOIA, such non-exempt information must be publicly disclosed. The MPO will be used only when it is appropriate to grant limited access to information that the Commission determines should not be routinely available for public inspection pursuant to Sections 0.457(d) or 0.459(a).

23. While we believe the MPO will prove appropriate in most instances where protective orders are appropriate, the Bureaus will retain the authority to use a different or modified protective order where they determine it is warranted. The MPO may also be used to provide limited access to information on a timely basis where the submitter has made a good faith request for confidential treatment of information pursuant to Section 0.459(a) and the Commission has not yet ruled on that request.[85] The latter use is consistent with existing Commission practice. We note, however, that where a request for confidential treatment is pending, release of information, even under a protective order, will be delayed pursuant to Section 0.459(g) to permit the submitting party to file an application for review with the Commission and then a judicial stay.

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[83] *Notice*, 11 FCC Rcd at 12424.

[84] *Compare, e.g.*, Sprint Comments at 3-4 and GCI Comments at 13 (supporting the adoption and use of the MPO), *with, e.g.*, ALTS Reply Comments at 8 and CBT Comments at 2-4 (criticizing the use of protective orders).

[85] *See, e.g., In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2214 (1997) (*Tariff Streamlining*) (the Bureau will "routinely employ the standard protective order in the pre-effective tariff review process to permit meaningful participation by interested parties, so long as the carrier has made a good faith showing in support of confidential treatment."), *petitions for reconsideration pending*.

24. The MPO we adopt here is substantially similar to the MPO proposed in the *Notice* and the MPO adopted in *Tariff Streamlining* proceeding,[86] modified, as we now discuss, in light of the comments received.

25. Off-Site Inspection. In some circumstances, where the quantity of material subject to inspection is very large, a submitting party may also file a request with the Commission that the entirety of the material not be filed with the Commission. If the Commission grants this request, Commission staff or any party examining the material under the terms of a protective order at an off-site location may designate portions of the material for inclusion in the record. The submitting party shall promptly file such designated material under seal in the record. This procedure will minimize the need for the Commission to store in a secure fashion large quantities of potentially irrelevant material while ensuring that relevant material is placed in the record.

26. Restrictions on persons with authorized access to materials under the MPO. We decline to adopt the suggestion that parties examining information under a protective order should be limited to allowing review by a set number of persons with various sublimits.[87] We believe such limitations may unreasonably preclude a party from utilizing individuals, consistent with its needs and resources, who can provide the requisite expertise to examine the documents.[88] For example, the Joint Parties' proposal to limit the number of attorneys per party who could examine documents subject to a protective order would preclude a partner in a law firm from obtaining the counsel of associates.[89] The serious consequences of violating a Commission protective order make this limitation unnecessary. We will, however, in rare instances such as when specific future business plans are involved, consider limiting access to documents to outside counsel and experts so as to minimize the

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[86] *Tariff Streamlining*, 12 FCC Rcd at 2210-16, 2239-45.

[87] *See* Joint Parties Comments at App. A at 2-3 (proposing to limit access to seven persons per party with various sublimits such as one inside and one outside counsel); CBT Reply Comments at 6-7 (agreeing with the Joint Parties' comments and urging advance notice of who will have access); MCI Comments at 20 and MCI Reply Comments at 7 (urging that access restriction be eased).

[88] *See* GCI Reply Comments at 7. We reached a similar conclusion in *Tariff Streamlining*, 12 FCC Rcd at 2215-16.

[89] Joint Parties Comments at 6 and App. A at 2-3.

potential for inadvertent misuse of such information.[90] A party seeking this additional degree of protection must justify its request when filing a request for confidential treatment. In making such a request, a party should specify the modifications to the model protective order that it believes to be necessary. The Commission, as necessary, may seek comment from the other parties to a proceeding on whether such modified protective procedures are appropriate in the particular case at hand.

27. Copying of confidential information under the MPO. A variety of comments were received concerning the copying of confidential information made available under the MPO. The Joint Parties suggest prohibiting copying of information provided under a protective order.[91] However, ALTS believes that this prohibition would present a tremendous problem for companies or associations who have few or no employees working in the Washington D.C. area.[92] We agree that a ban on copying materials subject to a protective order imposes an unnecessary burden on the review of such information. Moreover, we believe a prohibition on copying might lead to a less thorough review of the confidential documents and accordingly to less useful public comment. For these reasons, we decline to adopt the Joint Parties's suggestion. We will, however, modify the MPO to require a reviewing party to keep a written record of all copies made and to provide this record to the Submitting Party on reasonable request.[93]

28. MCI suggests deleting the 25 cents maximum per page copying charge in the MPO and replacing it with a reasonable cost-based maximum.[94] We reject this proposal, believing it prudent to avoid disputes over what copying charges are reasonable by setting a maximum charge for copying. At the time individual protective orders are issued, however, the issuing Bureau may modify the maximum charge per page for copies as circumstances warrant.

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[90] *See Southwestern*, 12 FCC Rcd at 7774, 7777 (Att. A ¶ 5(2)(a)) (protective order granted limited access by certain persons).

[91] *See* Joint Parties Comments at App. A at 3 (three copies only).

[92] ALTS Reply Comments at 9; *see* Time Warner Reply Comments at 11-12.

[93] We reached a similar conclusion in *Tariff Streamlining*, 12 FCC Rcd at 2216 and n.129. We recognize that in the circumstances of *Southwestern*, 12 FCC Rcd at 7774, 7779 (Att. A ¶ 12), we approved restrictions on the number of copies that could be made under a protective order, but reject that approach in general.

[94] MCI Comments at 20.

29. Sanctions for violations of the MPO. Several commenters urge us to add language to the MPO to spell out the consequences of violating the order.[95] Current laws and regulations already provide the Commission and the courts with a broad range of sanctions for violations of Commission orders.[96] Nonetheless, we modify the MPO to include more examples of the available sanctions for addressing violations of our protective orders to (i) specify that possible sanctions for violation of a protective order include disbarment from Commission proceedings, forfeitures, cease and desist orders, and a denial of access to confidential information in that and other Commission proceedings; (ii) clarify that the MPO is also an agreement between the reviewing parties and the submitting party; (iii) clarify that the submitting party retains all rights and remedies available at law or equity against any party using confidential information in a manner not authorized by the protective order; and (iv) require violating parties to notify immediately the Commission and the submitting party of the identity of anyone who improperly obtains or uses the confidential information.[97]

30. Duration of confidentiality protection. The MPO proposed in the *Notice* did not specify how long the MPO would be binding on the parties. GTE recommends that the MPO state that counsel who retain copies of pleadings containing confidential information after final resolution of the matter must continue to protect the information in accordance with the requirements of the MPO.[98] MCI recommends that confidential information be protected for only three years.[99] While we recognize that many types of confidential information become less sensitive as time passes, we do not believe that there is a sufficient

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[95] *Compare* GTE Comments Attachment A, at 4; Joint Parties Comments, Appendix A at 3 *with* Time Warner Reply Comments at 9-11. The Joint Parties further suggest establishing more specific sanctions such as denying a breaching party access to confidential information in any FCC proceeding for a fixed period of time. Joint Parties Comments App. A at 3. CBT urges the Commission to specify a dollar amount to be paid in liquidated damages, and prohibit violators from competing with the injured party for six months. CBT Comments at 4. We do not believe it is necessary to adopt these specific remedies.

[96] *See* 47 C.F.R. § 1.24(a) (Commission may censure, suspend, or disbar any attorney who, *inter alia*, breaches the standards of ethical conduct); 47 U.S.C. § 503(b)(1)(B) (authorizing the Commission to fine persons who willfully violate its orders); 47 U.S.C. §§ 401(b) and 401(c) (the Attorney General, the Commission, or any injured party may initiate enforcement actions seeking injunctive relief in Federal district court against any party who violates Commission orders).

[97] We adopted a similar approach in *Tariff Streamlining*, 12 FCC Rcd at 2215, 2243 (Att. B ¶ 13).

[98] GTE Comments Att. A at 4.

[99] MCI Comments at 21.

basis in the record to limit treatment under a protective order to any set period. Accordingly, we will address claims of staleness on a case-by-case basis, as CBT suggests.[100] The prohibition on the unauthorized disclosure or use of the confidential information remains binding indefinitely unless the submitting party otherwise agrees or the Commission or a court determines that particular information should be released from restrictions contained in the protective order. We also modify the MPO to allow a reviewing party to retain attorney work product containing confidential information, so long as that information remains subject to the MPO.

31. Use of confidential materials subject to the MPO in other proceedings. Time Warner suggests that the MPO should state that information received under a protective order may be used in more than one proceeding, if the Commission finds that such use would be in the public interest.[101] The Joint Parties assert, however, that any marginal benefit from such use would be greatly outweighed by the prejudice to the LECs involved in the proceedings.[102] We believe that routinely allowing confidential information from one proceeding to be used in other proceedings will increase the burdens, risks, and disputes associated with protective orders. Therefore, as a general matter, we will allow information subject to a protective order to be used only in the proceeding in which it was obtained.[103] However, we reserve the right to permit the use of protected material in more than one Commission proceeding in the exceptional case where the Commission finds that such use would be in the public interest. A party seeking to use protected information obtained in one proceeding in another proceeding may file a petition with the Commission explaining why such use of the protected information is appropriate. Any such petition shall ensure that any protected information contained in or accompanying the petition is protected from public disclosure.

32. Other MPO issues. We note that the MPO, as originally proposed, already contains the requirement proposed by Joint Parties that all authorized representatives be required to execute non-disclosure agreements agreeing to be bound by the terms of the protective order.[104] We will not adopt for general usage CBT's suggestion that confidential

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[100] *See* CBT Comments at 6-7.

[101] Time Warner Comments at 11-12; *see also* ALTS Reply Comments at 10.

[102] Joint Parties Reply Comments at 13-14.

[103] We adopted a similar approach in *Tariff Streamlining*, 12 FCC Rcd at 2242 (Att. B ¶ 11) (use of confidential information only in proceeding in which confidential materials were produced).

[104] *See* Joint Parties Comments App. A at 2-3.

information be made available only to an independent auditor, as the Commission did to prevent disclosure of the SCIS computer model.[105] While appropriate in very unusual cases, this procedure would be impractical for conventional Commission proceedings.[106] Finally, we reject SBC's suggestion that we adopt a protective order that divides confidential information into two classes to be treated differently.[107] A standard protective order that further subdivides the categories of confidential information, treats them differently, and denies parties the ability to copy any information from certain categories, would impose undue burdens on parties reviewing information and the Commission. We believe this procedure is unnecessary given the above-described requirements to keep a log of any copies made and the substantial sanctions for the violation of a protective order.

C. Issues That Arise With Respect to Specific Types of FCC Proceedings

1. Title III Licensing Proceedings

33. Section 309 of the Communications Act provides that the Commission must allow at least 30 days following issuance of a public notice of certain radio license applications for interested parties to file petitions to deny an application.[108] In addition, relevant case law indicates that petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.[109] Although our rules

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[105] *See* CBT Comments at 3, *citing ONA Access Tariff*.

[106] *See Southwestern*, 12 FCC Rcd at 7772-73 (rejecting use of *ONA Access Tariff* model); Time Warner Reply Comments at 7 (asserting that the lack of direct access to the information will limit the ability of interested parties to properly frame the questions necessary to effectively analyze the data); *see also* Joint Parties Comments at 5 (noting that the independent party reviewing the material would have to be subject to a nondisclosure obligation).

[107] *See* SBC Comments at 8-11 ("confidential" and "highly sensitive confidential" categories).

[108] 47 U.S.C. §§ 309(b), (d)(1). Section 3008 of the Balanced Budget Act of 1997, Pub. L. No. 105-33 (1997), provides that with respect to frequencies assigned by competitive bidding the Commission may specify a period of no shorter than five days for the filing of petitions to deny.

[109] *See, e.g., Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (en banc) (although Commission need not allow discovery on EEO claim in license renewal case, the full report of the Commission's investigation, including all evidence it receives, must be placed in the public record, and a stated reasonable time allowed for response by petitioners); *see also Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 6053, 6054 (1987) (if after reviewing information submitted in connection with

specify that broadcast and other Title III license applications are routinely available for public inspection,[110] applicants sometimes request confidential treatment pursuant to Section 0.459. We therefore sought comment on whether our general policy should be to discourage submission of confidential information, but still leave the Commission some discretion to use protective orders in appropriate cases, or adopt a general policy permitting disclosure of confidential information only pursuant to protective orders.[111] If we were to adopt a policy favoring the use of protective orders in licensing proceedings, we questioned whether petitioners should be given an opportunity to supplement their petitions to deny after reviewing the protected material.[112] We also invited comment on whether members of the public should have access to such material pursuant to protective orders, to enable them to determine whether they wish to file petitions to deny, and whether such a policy would tend to unduly delay Commission action on license applications.[113]

34. Although the Joint Parties indicate that a party should not be required to forego trade secrets as a condition of obtaining a Commission license, the Joint Parties nonetheless, note that, with the exception of experimental licenses, most information submitted in Title III licensing proceedings should be made publicly available.[114] We agree. We will continue the practice of making broadcast and other Title III license applications

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Commission investigation of license applications, Commission tentatively decides hearing unnecessary, it will disclose information and afford opportunity to comment before final decision), *amended*, 3 FCC Rcd 3995 (1988).

[110] *See* 47 C.F.R. §§ 0.453(d), 0.455(a).

[111] *Notice*, 11 FCC Rcd at 12424-26.

[112] *Id.* at 12425-26.

[113] *Id.* at 12426. *See generally Motorola*, 7 FCC Rcd at 5064 n.7 (noting that the Office of Engineering and Technology had declined to grant confidentiality requests and to issue protective orders as a routine matter in pioneer preference proceedings because use of protective orders tends to delay completion of proceedings).

We also inquired whether it is ever appropriate to withhold absolutely some Exemption 4 information, *Notice*, 11 FCC Rcd at 12426, and, if so, what standard should be used. Finally, we questioned whether different policies should apply to different categories of material in these proceedings. *Id.* Given the paucity of comment on these issues, we find it unnecessary to resolve these questions at this time.

[114] Joint Parties Comments at 8; *see also* MCI Comments at 19.

routinely available for public inspection.[115] We expect that requests for confidentiality or protective orders in licensing proceedings will and should remain relatively rare. Nevertheless, we agree with the Joint Parties that a party should not necessarily be required to forego confidential information as a condition of obtaining a license. Accordingly, the Commission will consider requests pursuant to Section 0.459 of our rules to limit disclosure of confidential information to individuals and entities who file a petition to deny and who execute a protective order. Where appropriate, the Commission will issue protective orders consistent with the MPO discussed previously. We agree with MCI that if the Commission decides to permit disclosure of certain information only pursuant to a protective order, the petitioner should be given an opportunity to file or supplement its petition to deny the license after it has had an opportunity to review the protected material.[116] If the Commission decides to issue a protective order, interested parties generally will be given at least 30 days from the date the protected material becomes available to file or supplement a petition to deny.

2. Tariff Proceedings

35. The Communications Act generally requires common carriers to file and maintain tariffs with the Commission, and gives the Commission authority to review them for lawfulness.[117] The Commission's rules specify that certain dominant carriers filing a letter of transmittal to change their rates, offer a new service, or change the terms and conditions under which existing service is offered must include certain cost support data.[118] Similarly, carriers subject to price cap regulation must also provide support information.[119] Under Section 0.455(b)(11) of our rules, cost support data is routinely available for public inspection.[120] Historically, we have withheld such information from public inspection only in

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[115] *See Jeffrey A. Krauss*, 11 FCC Rcd 10819, 10821 (1996) (withholding experimental license application supporting documents but releasing the application form).

[116] MCI Comments at 19.

[117] 47 U.S.C. §§ 203 and 204. The Commission may forbear from enforcing these requirements pursuant to Section 10 of the Communications Act, 47 U.S.C. § 160. *See, e.g., Hyperion Telecommunications, Inc., Petition Requesting Forbearance*, 12 FCC Rcd 8596 (1997); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730 (1996), *stayed sub nom. MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

[118] 47 C.F.R. §§ 61.33 and 61.38.

[119] 47 C.F.R. § 61.49.

[120] 47 C.F.R. § 0.455(b)(11).

limited circumstances, such as when it has been necessary to protect third-party vendor data.[121]

36. Two changes prompted us to seek comment in the *Notice* on the handling of requests for confidentiality in the context of the tariff review process.[122] First, carriers began filing more requests for confidential treatment of their cost support data.[123] Second, the statutory period to review certain tariff filings has changed. Prior to the Telecommunications Act of 1996, the Commission could require a notice period of up to 120 days between the filing of a tariff and its effective date.[124] The tariff went into effect at that point unless the Commission issued an order rejecting or suspending and investigating the tariff.[125] While that time line still applies to some tariff filings, as of February 8, 1997, pursuant to Section 204(a)(3) of the Communications Act, local exchange carriers may file charges, classifications, regulations or practices on a streamlined basis. Streamlined filings are effective unless the Commission acts in seven days (for rate reductions) or 15 days (for rate increases).[126]

37. Since the issuance of the *Notice*, we have adopted new procedures to handle confidentiality requests in tariff review cases. First, in *Tariff Streamlining*, we concluded that pre-effectiveness tariff review was required to implement Section 204(a)(3) of the Communications Act.[127] Consistent with our observation in the *Notice*, *Tariff Streamlining* concluded that requests for confidentiality could not be resolved in the 7 or 15-day pre-

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[121] *See MCI Telecommunications Corp.*, 58 RR 2d at 190 (allowing MCI access under protective order to certain agreements with third parties filed by AT&T).

[122] *See Notice*, 11 FCC Rcd at 12427-28.

[123] *Id.; see, e.g., Letter from Kathleen M.H. Wallman to Jonathan E. Canis, et al.*, 9 FCC Rcd 6495 (1994) (denying unrestricted access to cost support data filed in connection with a virtual collocation tariff, but allowing access pursuant to a protective order), *application for review denied in part, granted in part sub nom. Southwestern Bell Telephone Co.*, 12 FCC Rcd 7770 (1997); *McGrew Letter*, 10 FCC Rcd at 10575 (restating history of allowing open tariff proceedings, but allowing protection where cost data disaggregated and with potential of revealing market plans and positions in access services market).

[124] *Notice*, 11 FCC Rcd at 12427, *citing* 47 U.S.C. § 203(b)(2) and 47 C.F.R. § 61.58(a)(2).

[125] 47 U.S.C. § 204.

[126] 47 U.S.C. § 204(a)(3).

[127] *Tariff Streamlining*, 12 FCC Rcd at 2197.